



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Frank Cain & Sons, Inc.

File: B-236893

Date: January 11, 1990

DIGEST

1. Where procuring agency makes an award to the next low bidder after determining that the protester was nonresponsible because of an unsatisfactory record of integrity, protester's due process rights were not violated because the agency determination applied to one procurement only, which did not constitute a de facto debarment or suspension where due process considerations are applicable.

2. Contracting agency reasonably determined that bidder was nonresponsible based on information in a criminal investigation report which called into question the bidder's integrity based on conduct under recent government procurements.

DECISION

Frank Cain & Sons, Inc., protests the determination that it was nonresponsible because of an unsatisfactory record of integrity under invitation for bids (IFB) No. DAHC92-89-B-0191, issued by the United States Army South, Fort Clayton, Panama, for packing and crating all equipment, materials and supplies for the relocation of the Defense Mapping Agency Cartographic School currently located at Fort Clayton. The Army determined that Cain was nonresponsible and rejected its low bid based on an interim U.S. Army Criminal Investigation Division (CID) report.

We deny the protest.

At bid opening, on August 15, 1989, the Army received four bids. Cain's bid was low at \$19,499; the other bids were \$87,690; \$139,600; and \$173,000. The government estimate was \$200,000. On August 29, the contracting officer determined Cain nonresponsible for lack of integrity and business ethics based on the CID report. On September 1, the contract was awarded to Mantenimiento Aliado, S.A., the second low bidder, for \$87,690.72. On September 5, a notice

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of award was sent to Cain, indicating that Cain had been found nonresponsible based on information provided by an investigation.

Cain protested to our Office on September 11, alleging that it should have received the award, and that the nonresponsibility finding lacked a rational basis. After receiving the agency report which revealed that the Army determined Cain nonresponsible on the basis of a CID report finding a lack of integrity, Cain argues that the Army's disqualification was "an arbitrary and capricious infringement" of Cain's constitutionally protected due process rights. The Army redacted the specific facts contained in the CID report on which the contracting officer relied in making her non-responsibility determination. Cain argues that constitutionally-guaranteed procedural due process requires the Army to notify Cain of the specific facts on which the Army based its nonresponsibility determination and to provide Cain the opportunity to respond to the allegations against it before depriving it of the award, citing Old Dominion Dairy Products, Inc. v. Secretary of the Defense, 631 F. 2d 953 (D.C. Cir. 1980).

In Old Dominion, the court held that a de facto debarment resulted from an agency's determination that a contractor lacked integrity; the court held that in such circumstances, due process guaranteed by the Fifth Amendment of the United States Constitution required that notice of the charges be given to the contractor as soon as possible so that the contractor could present its side of the story before adverse action was taken. Old Dominion, 631 F.2d at 968.

The facts in Old Dominion and cases which have followed^{1/} indicate that the nonresponsibility determinations involved more than one procurement, which led the courts to find de facto debarment or suspension. The instant protest involves only one procurement, however, and Cain has not argued that it has been deprived of other contracts. When a contractor is deprived of an award in only a single procurement, there is no basis for a finding of constructive or de facto debarment unless there are specific facts warranting such a conclusion. Energy Management Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38. There is nothing in the record warranting such a conclusion here. Accordingly, since we cannot conclude that Cain has been subjected to an actual or de facto debarment or suspension, Cain is not entitled to

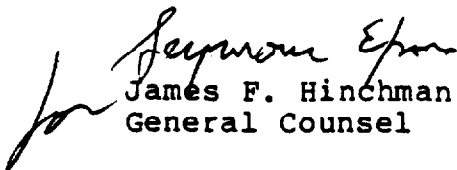
^{1/} ATL, Inc. v. United States, 3 Cl. Ct. 259 (1983); Viktoria-Schaefer Inter. v. U.S. Dept. of the Army, 659 F. Supp. 85 (D.D.C. 1987).

the procedural due process rights which it claims are required in connection with this particular nonresponsibility determination, nor is Cain entitled to rights provided by the Federal Acquisition Regulation provisions dealing with suspension or debarment. Id.

In general, the determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must of necessity rely on his business judgment. Firm Reis GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. While the determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency because it must bear the brunt of any difficulties experienced during performance of the contract. Fund for Equal Access to Society, B-228167, Jan. 20, 1988, 88-1 CPD ¶ 54. Because of the broad discretion of the contracting officer in these matters, our Office generally will not disturb a nonresponsibility determination absent bad faith on the agency's part or a lack of a reasonable basis for the determination. Id.

Here, there is no evidence of bad faith and we find that the record reflects a reasonable basis for the determination. The contracting officer based her nonresponsibility determination on information and recommendations contained in the CID report. We have reviewed this report and we find that it does contain information from which the contracting officer reasonably could conclude that Cain's employees' conduct under recent government procurements raises a serious doubt as to the integrity of the company. We have held that such CID report information may be used as the basis of a nonresponsibility determination without the conduct of an independent investigation by the contracting officer to substantiate the accuracy of the report. See Energy Management Corp, B-234727, supra; Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289. Accordingly, we conclude that the Army had a reasonable basis to determine Cain nonresponsible for a perceived lack of integrity based on the CID investigation report information.

The protest is denied.


James F. Hinchman
General Counsel